

**ECCLESIASTICAL OFFICES (TERMS OF SERVICE) REGULATIONS 2009**

**CAPABILITY PROCEDURE**

**DRAFT CODE OF PRACTICE MADE UNDER SECTION 8 ECCLESIASTICAL  
OFFICES (TERMS OF SERVICE) MEASURE 2009**

CONTENTS

PART 1  
INTRODUCTORY

1. The authority of the capability procedure

PART 2  
GENERAL

2. The purpose of the capability procedure is improvement
3. Basic principles and requirements

PART 3  
BEFORE INVOKING THE FORMAL PROCEDURE

4. The role of the appointed person
5. Meeting with the office holder
6. Helping to improve performance
7. Review of progress
8. Informal warning

PART 4  
THE FORMAL PROCEDURE

9. Initiating the formal procedure
10. The right to be accompanied
11. Formal procedure stage one – first formal written warning
12. Formal procedure stage two – final formal written warning
13. Formal procedure stage three – removal from current office

PART 5  
OTHER ISSUES

14. Appeals
15. Use of grievance procedure
16. Keeping records
17. After removal from current office
18. Membership of the panels
19. Use of a shortened procedure

PART 6  
INCAPABILITY DUE TO SICKNESS, INJURY OR DISABILITY

20. Dealing with absence

PART 7  
CURRENCY OF WARNINGS

PART 8  
SUSPENDING AN INQUIRY

ANNEX  
MEMBERSHIP OF PANELS TO HEAR CASES AND APPEALS

## *1. The authority of the procedure*

- 1.1 This Code of Practice is issued by the Archbishops' Council under section 8 of the Ecclesiastical Offices (Terms of Service) Measure 2009 and Regulation 31(3) of the Ecclesiastical Offices (Terms of Service) Regulations 2009. Anyone dealing with issues of capability in relation to any office holder on Common Tenure must have regard to this Code of Practice.
- 1.2 This Code is supported by advice on good practice issued from time to time by the Archbishops' Council and available at [www.commontenure.org](http://www.commontenure.org).

## **PART I - INTRODUCTORY**

### *2. The purpose of the capability procedure is improvement*

- 2.1 The principal objective of a capability procedure is to help office holders whose performance falls below an acceptable minimum standard to improve in cases where the problems are not disciplinary in nature. It is expected that most performance-related matters will be identified and addressed informally without engaging this procedure. Nevertheless, there will be occasions where informal steps are not appropriate and in such cases it will be necessary to implement the procedure. If an improvement in performance cannot be achieved through the capability procedure, there is a real possibility that the office holder will be removed from his or her current office, but only as a last resort.
- 2.2 Capability is demonstrated by the execution of the duties of a particular office to an acceptable minimum standard over a sustained period of time. It is about both what an office holder does and how he or she does it.
- 2.3 In assessing what is an acceptable minimum standard, the requirements of the post should be taken into account along with the more general requirements of the Canons, the Ordinal, and the Ecclesiastical Offices (Terms of Service) Measure and Regulations 2009.
- 2.4 Lack of capability in one particular office does not necessarily mean that the office holder is not capable of exercising any ministerial function. Removal from one particular office on capability grounds does not remove a cleric from holy orders or disqualify him or her from being appointed to another office. Regulation 29 (1)(e) of the Ecclesiastical Offices (Terms of Service) Regulations 2009 provides a means whereby a cleric who has been removed from one office on capability grounds may be appointed to another office on a probationary basis.

- 2.5 Except in the limited circumstances prescribed in Canon C8.2, clerics are unable to carry out any ministerial function without authority from the bishop. Before granting a licence or permission to officiate to clergy who have been removed from office for incapability, or instituting them to a benefice, the bishop should satisfy himself that their new duties are demonstrably different in nature from those in their previous post or that there is some other good reason why the previous lack of capability is no longer an issue.

## **PART 2 - GENERAL**

### *3. Basic principles and requirements*

3.1 The procedure is based on the following principles:

- a) the procedure must not be used in response to complaints that are found to be frivolous or unsubstantiated
- b) the primary purpose of the procedure is to find a way of helping the office holder to improve unsatisfactory performance
- c) the procedure should be carried out in a way that is fully in accord with the requirements of natural justice
- d) appropriate human resources advice should be taken
- e) the office holder should be given the opportunity to respond to all points made
- f) a panel should be involved at every formal stage and formal decisions should not be made by an individual acting alone
- g) reasonable notice should be given in advance of any meeting of a panel
- h) the office holder should have the right to be supported by a trade union representative or a lay or ordained colleague
- i) sanctions should only be imposed if the office holder has not reached the specified level of improvement
- j) there should be a right of appeal at every formal stage
- k) meetings to resolve matters should be held as soon as reasonably possible after the issue has been raised and the evidence gathered, in order to minimise the level of anxiety experienced by those involved
- l) the bishop should ensure that appropriate pastoral support and care is provided for office holders undergoing the procedure.

3.2 Lack of capability is one of the grounds upon which an Employment Tribunal is entitled to find that a dismissal is fair. However, a decision to dismiss on this ground should never be the outcome of a single meeting, but only after a series of conversations that have:

- assessed the evidence
- recorded dissatisfaction with performance
- provided evidence of opportunities given to improve and develop
- noted where there was persistent failure to improve.

- 3.3 Regulation 31(2) of the Ecclesiastical Offices (Terms of Service) Regulations 2009 provides that an office holder who is the subject of an inquiry into his or her capability shall be entitled, before the inquiry begins, to be informed in writing of:
- a) any matters relating to the office holder's performance which are to be taken into account in assessing his or her performance
  - b) the procedure which is to be followed in assessing his or her performance which shall include the opportunity of a meeting between the office holder and the person who or authority which is to carry out the procedure
  - c) any action which may be taken following the completion of the procedure
  - d) the office holder's rights of appeal against the decision to take any action against the office holder.

### **PART 3 - BEFORE INVOKING THE FORMAL PROCEDURE**

#### *4. The role of the appointed person*

- 4.1 The provision of ministry within the diocese is the responsibility of the diocesan bishop<sup>1</sup> and the proper use of this procedure to address inadequate ministry falls within the scope of that responsibility. However, the bishop will usually find it helpful to appoint a suitably competent person ('the appointed person') to act on his behalf in these matters and to oversee the capability procedure, particularly in the early stages. The appointed person should normally be the archdeacon. Any report that appears to raise issues of capability should be referred initially to the appointed person. The appointed person may also raise the issue him or herself.
- 4.2 When the appointed person is made aware of a potential capability matter, he or she should ensure that appropriate investigations are made to establish whether there is a capability issue and that written records are kept for later reference.
- 4.3 The appointed person should not chair or be a member of the capability panels.
- 4.4 The appointed person should collect information about the issue(s). If the person reporting the alleged capability problem is not prepared to be put on record or participate in the procedure, the appointed person should not take the matter any further. If the matter concerns a parochial office holder and the person reporting it is not one of the churchwardens, the appointed person may discuss the matter with the churchwardens, and should ensure that both the person reporting the issue and the office holder are informed about the substance of any such conversation. The procedure should not be taken further if the report that originated it is found to be vexatious or unsubstantiated.
- 4.5 The appointed person should consider any other information (which may include the results of ministerial development reviews) that helps to provide an overview of the office holder's performance. While some cases may be fairly clear-cut, others may be more complex, and might require information to be gathered from a variety of sources. The incidents which

---

<sup>1</sup> An area or suffragan bishop may exercise the functions of the diocesan bishop under this procedure where he has been given authority by the diocesan bishop so to do. In such cases another suitable person, (such as the Dean) should take the place of the area or suffragan bishop as a member of a capability panel.

have given rise to concern may be small in themselves but may represent part of a cumulative and persistent pattern of behaviour or ways of doing things that prevents the person from fulfilling the requirements of the post.

4.6 Before deciding to implement the informal stage of the capability procedure, the appointed person should:

- discuss the case with a human resources adviser
- review the role description and recent records of ministerial development review
- check whether
  - there might be issues related to gender or misunderstanding arising from cultural assumptions
  - the capability issue is the result of the office holder being in the wrong post for his or her particular talents
  - the issue can be resolved in some other way than commencing a capability inquiry, for example by a timely offer of help or advice
  - the expectations set out in the role description and any recently set objectives are unclear or unrealistic.

### *5. Meeting with the office holder*

5.1 If the appointed person decides to take the matter further, he or she should consult the human resources adviser and arrange a meeting with the office holder. The appointed person should write to the office holder a letter which complies with the requirements set out in paragraph 3.3 above. The meeting should be held without unreasonable delay whilst allowing the office holder reasonable time to prepare his or her case

5.2 At the meeting the appointed person must review the issues with the office holder. In assessing whether there is a capability issue, the appointed person should take account of the office holder's particular strengths and gifts, but should remember that the primary issue will be the requirements of the post and whether the post holder is meeting them to an acceptable standard.

5.3 One outcome may be that, after the facts have been gathered and considered, a complaint or concern is found to be unjustified or trivial. The appointed person may also take the view that the problems that have been identified are the result of particular circumstances and do not give rise to any concerns about capability in the longer term. Another outcome may be that the expectations surrounding the role and the office holder are found to be unrealistic. In this situation the appointed person should examine the role description, in order to check whether it needs revision in the light of changing circumstances.

5.4 If he or she decides that there is a capability issue, the appointed person should:

- indicate a commitment to identifying and overcoming shortcomings in the office holder's performance and a willingness to help with remedial measures
- explore with the office holder any contributory factors (such as domestic circumstances)

- explore what can be offered to the office holder to assist in improving performance (see the section on helping to improve performance below)
- seek to agree with the office holder a form of action to improve performance
- set a date for reviewing progress.

5.5 If the concerns were raised by others, the appointed person should inform them that action is being taken, that improvement is expected, and that they will be asked to comment on this at a later stage. If he or she decides that no further action is required, the appointed person should inform the office holder and those who raised the problem in writing that no further action will be taken.

## *6. Helping to improve performance*

Ways in which an office holder may be helped to improve their performance include:

- coaching
- training
- counselling
- altering working arrangements
- a period of special leave
- mediation
- mentoring
- exploring the possibility of transferring the office holder to other work, if such work is available
- suggesting that the office holder may wish to have an interview with the Clergy Appointments Adviser, who will be able to offer confidential advice about the office holder's abilities and help them consider whether it might be appropriate to explore the possibility of finding an alternative post.

## *7. Review of progress*

7.1 After the agreed interval the appointed person should review with the office holder and those who initially raised the concerns whether improvement has taken place as hoped. If this review does not include the churchwardens, the appointed person may take their advice. (Any separate conversations with those who raised the matter or with churchwardens should be reported to the office holder.)

7.2 The appointed person should review the evidence in consultation with the human resources adviser. If the appointed person decides that there has been a satisfactory improvement in the office holder's performance, he or she should inform the office holder and those who initially raised the concerns that no further action will be taken.

## *8. Informal warning*

8.1 If the appointed person decides that office holder's performance has not improved to an acceptable standard, he or she should notify the office holder in writing that their performance will be monitored over a specified period, and that, if there is a failure to improve, the formal stage may be commenced. The person(s) who raised the concerns, and others as appropriate, may be asked to assist in the monitoring process.

- 8.2 At the end of the specified period, the appointed person should decide, on the basis of information gathered from the office holder and those who have been monitoring his or her performance, whether there has been sufficient improvement and, if not, whether or not to move to the formal stage of the procedure. If the appointed person decides that sufficient improvement has taken place, he or she should write to the office holder confirming this.

#### **PART 4 - THE FORMAL PROCEDURE**

##### *9. Initiating the formal procedure*

- 9.1 If informal action does not bring about the required improvement and the appointed person considers the concerns to be of sufficient substance, he or she should inform the bishop(s) that formal action will be taken.
- 9.2 From this point on, the human resources adviser – who should work with the appointed person to ensure that the process is properly followed – should be involved at every stage.

##### *10. The right to be accompanied*

- 10.1 Office holders should be given the right (subject to making a reasonable request) to be accompanied at all formal stages by a trade union representative or a lay or ordained colleague.
- 10.2 What is reasonable will depend on the circumstances of each individual case. However, it will not be reasonable for an office holder to insist on being accompanied by someone whose presence would prejudice the hearing.

##### *11. Formal procedure stage one – first formal written warning*

- 11.1 The appointed person, after taking advice from the human resources adviser, should write to the office holder requiring him or her to attend a meeting with a capability panel. (For membership, see the Annex.) The meeting should be held without unreasonable delay whilst allowing the office holder reasonable time to prepare his or her case.
- 11.2 The letter should provide:
- information about the alleged incapability including copies of any documents which will be produced at the meeting
  - details of the membership of the panel
  - an invitation to the office holder to request the attendance of a lay or ordained colleague or trade union representative
  - an invitation to the office holder to call relevant witnesses at the hearing provided that advance notice is given.
- 11.3 The appointed person and the office holder may call relevant witnesses. If they intend to do so, they must give advance notice to the other party and the panel members.



- 11.4 Where possible, the timing and location of the meeting should be agreed with the office holder. The meeting should be held in a private location with no interruptions.
- 11.5 An office holder who cannot attend a meeting should inform the appointed person in advance whenever possible. If the office holder fails to attend through circumstances outside his or her control and unforeseeable at the time the meeting was arranged (e.g. illness) the appointed person should arrange another meeting. A decision may be taken in the office holder's absence if the office holder fails to attend the re-arranged meeting without good reason.
- 11.6 If an office holder's colleague or trade union representative cannot attend on a proposed date, the office holder may suggest another date, so long as it is reasonable.
- 11.7 At the meeting, the appointed person should explain the nature of the issues to the office holder and go through the information that has been gathered.
- 11.8 The office holder should be given the opportunity to set out his or her case (including calling witnesses) and answer any allegations that have been made. The office holder should also be allowed to ask questions.
- 11.9 The office holder's colleague or trade union representative should be permitted, with the office holder's permission, to ask questions and make representations, but they should not be allowed to answer questions on behalf of the office holder.
- 11.10 The members of the panel may themselves ask questions.
- 11.11 Following the meeting, the capability panel should decide whether or not there is a capability issue. If not, the matter goes no further.
- 11.12 If the panel has decided that there is a capability issue, it should then go on to consider whether a warning is justified or not. Before making any decision, the panel should take account of:
- the office holder's ministry as a whole
  - the office holder's length of service
  - actions taken in any previous case involving the office holder
  - the explanations given by the office holder
  - whether the imposition of a formal warning is reasonable in all the circumstances.
- 11.13 Notice of the result of the meeting should be given to the office holder as soon as possible.
- 11.14 If the panel decides that no action is justified, the office holder should be informed in writing.
- 11.15 If the panel decides that a first formal written warning should be given, the appointed person should write a letter to the office holder:
- setting out the performance problem and the improvement required

- issuing a first formal warning with reasons, which the office holder is told will be placed on the personal file
- informing the office holder that if there is no satisfactory improvement within a specified time period (normally between 3 and 6 months depending on the nature of the issue) the outcome may be removal from the office he or she currently holds
- informing the office holder in writing of the right to appeal
- giving the office holder normally 7 days (or longer if in all the circumstances 7 days is unreasonable) after the date of receipt to indicate his or her intention to appeal in writing
- requiring the office holder to state briefly the grounds of any appeal.

11.16 The appointed officer should give a copy of the letter to the bishop.

11.17 A copy of the appointed person's letter should be used as the basis for monitoring and reviewing performance over the specified period.

11.18 If the office holder appeals within the period specified in the letter, the appeal administrator should invite the office holder to a meeting with an appeal panel. The meeting should be held without unreasonable delay whilst allowing the office holder reasonable time to prepare his or her case.

11.19 The appeal meeting should be attended by:

- the appointed person
- the human resources adviser
- the appeal panel (for composition of the panel see Annex )
- the office holder and his or her companion (if any)
- any relevant witnesses for either party where due notice has been given.

11.20. Notice should be given to the office holder as soon as possible after the appeal meeting setting out the decision of the appeal panel, with reasons.

## *12. Formal procedure stage two - final formal written warning*

12.1 At the end of the period specified in the first formal warning, the appointed person should again gather information as appropriate from those who have reported problems with the office holder's capability and others and from the office holder. The appointed person may decide that the required improvement has taken place; or that it is necessary to move to the next stage. He or she should inform the bishop accordingly.

12.2 The appointed person should write to the office holder as soon as possible after the end of the period specified in the first formal warning.

12.3 The letter should either:

- (a) advise the office holder that the capability inquiry is being discontinued in view of improved performance or

(b) set out the unresolved performance issues, and invite the office holder to a meeting with a second capability panel to discuss the matter. The meeting should be held without unreasonable delay whilst allowing the office holder reasonable time to prepare his or her case.

12.4 The same procedure should be followed as for the first formal panel meeting described above.

12.4 Notice of the decision of the panel, with reasons, should be given to the office holder as soon as possible after the meeting.

12.5 If the capability panel agrees that a final formal written warning should be given, the diocesan bishop, who chairs the panel, should write a letter to the office holder:

- setting out the performance problem and improvements required
- issuing a final formal warning with reasons, which he or she is told will be placed on the personal file
- informing the office holder that, if there is no satisfactory improvement within a specified time period (normally between 3 – 6 months depending on the nature of the issue), the outcome may be removal from the office he or she currently holds
- informing the office holder in writing of the right to appeal and how to exercise it
- giving the office holder normally 7 days (or longer if in all the circumstances 7 days is unreasonable) after the date of receipt to indicate his or her intention to appeal in writing
- requiring the office holder to state briefly the grounds of any appeal.

12.7 The appointed person should give a copy of the letter to the bishop.

12.8 A copy of the appointed person's letter should be used as the basis for monitoring and reviewing performance over the specified period.

12.9 If the office holder appeals, the same procedure should be followed as set out in paragraphs 11.18 – 11.20.

### *13. Formal procedure stage three - removal from current office*

13.1 The same procedure should be followed as for the first and second stages described above.

13.2 If at the end of the period specified in the final formal warning the appointed person considers that the required improvement has not taken place, he or she should write to the office holder notifying him or her that the required improvement has not taken place and requiring him or her to attend a formal hearing of the capability panel to determine whether or not he or she should be removed from office.

13.3 The appointed person should give reasonable notice of the date of the hearing.

13.4 The office holder should be given the opportunity of making a representation to the panel as to why he or she should not be removed from office. The same procedure should be followed as for the first formal panel meeting described above.

- 13.5 Notice of the decision of the panel, with reasons, should be given to the office holder as soon as possible after the meeting.
- 13.6 If the panel decides that the office holder should be removed from his or her current office, the diocesan bishop should normally serve notice in writing on the office holder:
- terminating the appointment with effect from a date of 3 months after the date of the notice (the termination may be with immediate effect, with pay being given in lieu of notice and provision for housing being made during the following 3 months)
  - stating the reason for removal from office
  - informing the office holder that he or she has the right to appeal
  - giving the office holder normally 7 days after the date of receipt of the letter (or longer if in all the circumstances 7 days is unreasonable) to indicate his or her intention to appeal in writing
  - requiring him or her to state briefly the grounds of any appeal.
- 13.7 If the office holder gives due notice of his or her intention to appeal, the appeal administrator should invite the office holder to a meeting with the appeal panel. The meeting should be held without unreasonable delay whilst allowing the office holder reasonable time to prepare his or her case.
- 13.8 The appeal meeting should be attended by:
- the appointed person
  - the human resources adviser if practicable
  - the appeal panel (for composition of the panel see Annex )
  - the office holder and his or her companion (if any)
  - any relevant witnesses for either party where due notice has been given.
- 13.9 Notice should be given to the office holder as soon as possible after the appeal meeting, setting out the final decision of the appeal panel, with reasons. There is no further right of appeal, but, if the office holder is removed from office, he or she has the right to make an application to an Employment Tribunal under Regulation 33 of the Ecclesiastical Offices (Terms of Service) Regulations 2009.

## **PART 5 - OTHER ISSUES**

### *14. Appeals*

- 14.1 None of those who are members of a capability panel may serve on an appeal panel in the same inquiry, although the appeal panel may ask members of the capability panel to appear before it or provide information in writing.
- 14.2 An office holder may appeal on the grounds that:
- fresh information has come to light

- the capability procedure was not followed.

14.3 The office holder's notice of appeal should indicate briefly the grounds on which the appeal is based. The appeal panel may request further information in writing prior to the date of the meeting.

#### *15. Use of grievance procedure*

15.1 It is open to an office holder to invoke the grievance procedure while a capability enquiry is in progress for any reason other than the handling of the capability procedure itself, but this will not have the effect of suspending the capability procedure, which will continue while the grievance is heard.

15.2 If the grievance is about the handling of the capability procedure, the office holder must use the appeal process above.

#### *16. Keeping records*

16.1 It is important, in the interests of all parties, to keep written records during the capability procedure. All personal data should be held and used in compliance with the Data Protection Act 1998. Records should include:

- the concerns raised about the office holder's capability
- the office holder's response
- findings made and actions taken
- the reasons for actions taken
- whether an appeal was lodged
- the outcome of the appeal
- any subsequent developments.

16.2 Records should be treated as confidential.

16.3 Copies of meeting records should be given to the office holder, including copies of any formal minutes that have been taken. In certain circumstances (for example to protect a person supplying information) the Data Protection Act 1998 may allow some information to be withheld.

16.4 At the point when any warning ceases to be in effect, the records relating to the capability proceedings should be placed in a sealed envelope on the office holder's personal file and retained for so long as the office holder remains in that office. This envelope should only be opened by the bishop, the human resources adviser or the appointed person, and should only be used if it is necessary to demonstrate that appropriate action has been taken, (for example, if an application is made to an Employment Tribunal following removal from office).

If the office holder takes up a new appointment then, unless that new appointment is designated as a probationary appointment under Regulation 29 of the Ecclesiastical Offices

(Terms of Service) Regulations 2009 or there is any other justifiable ground for keeping them, the records of spent capability proceedings should be destroyed.

*17. After removal from current office*

Where the final capability panel considers that the office holder is unsuitable for his or her current position, and should be removed from it, it is important to continue to provide support and pastoral care. In some cases it might be appropriate to provide career counselling.

*18. Membership of the panels*

- 18.1 Details of the composition of the panels are given in the table in the Annex. The office holder should be given the right to object to membership of the panel, but only on the grounds of alleged partiality. Those involved in dealing with capability procedures should have received appropriate training and be aware of people's cultural differences (particularly those relating to ethnicity).
- 18.2 Membership of the capability panel may be the same at each stage but no member of the capability panel may sit on any appeal panel. Where necessary, for example because of illness or a member of the panel moving on to another diocese, the appointed person may ask a substitute of equal standing to serve.
- 18.3 A panel's decision may be reached by a majority of two out of three panel members (or, where there are four members on the panel, three out of four).

*19. Use of a shortened procedure*

- 19.1 There will be exceptional cases in which the procedure may be shortened, but the principles of natural justice and the opportunity to appeal against removal from the current office must not be jeopardised. They will include the following:
- (a) Cases where immediate improvement can be expected, through an easily acquired alternative pattern of behaviour or action likely to produce immediate effects. If the expected improvement does not occur, and there are no mitigating circumstances such as ill health or personal difficulties, the procedure could move through each stage fairly quickly
  - (b) Cases arising during the first year of an office holder's tenure in any post or during the first three years of a title post, where it becomes clear that he or she is not suited to the post and so not capable of undertaking what is required. In the case of assistant curates, it will be important to bear in mind that they are still in a learning role, and that allowance for this needs to be made before the formal procedure is activated
  - (c) Cases of ill health (see Part 6 below).
- 19.2 In these very particular cases, the appointed person, with advice as appropriate from the human resources adviser, may decide that a shortened procedure should be used. Only one stage of the procedure may be dropped: that is, there must always be a formal warning stage

with appeal rights, prior to holding a final capability meeting that might result in removal from office.

## **PART 6 - INCAPABILITY DUE TO SICKNESS, INJURY OR DISABILITY**

### *20. Dealing with absence*

- 20.1 When dealing with prolonged or repeated absence from work, it is important to establish the reason. If there is no acceptable reason, the matter, if serious, could be treated as a conduct issue and dealt with as a disciplinary matter under the Clergy Discipline Measure 2003.
- 20.2 If the office holder is unable to carry out the requirements of the post as a result of long-term or persistent short-term sickness, injury or disability absence, or poor performance is caused by sickness, injury or disability, the law treats this as a capability issue and any eventual removal from office will be on the grounds of capability. So, if the absence or poor performance is serious enough to consider removal from office, it will be necessary (after taking specialist advice) to instigate the capability procedure.
- 20.3 As in other capability cases, a fair procedure must be followed and clearly documented to demonstrate that every attempt has been made to improve attendance or performance. In cases of long term or persistent sickness absence or poor performance as a result of illness, it may be necessary to make clear to the office holder that, however genuine the health problem, removal from their current office is a possibility because the duties of the office are not being carried out.
- 20.4 The handling of incapability due to sickness or injury needs to be distinguished from other capability issues. The appointed person should take a sympathetic and considerate approach, and the needs of the office holder must be borne in mind. In every case there will be different circumstances and varying factors to take into account, so the procedure must be applied flexibly, for example by using the shortened procedure. However the basic principles of natural justice must be followed:
  - a) evidence must be gathered
  - b) the office holder must be offered the opportunity to comment
  - c) a warning of the consequences of a lack of improvement must be given
  - d) help and time must be given to improve
  - e) a hearing should be held, if practicable, at which progress is reviewed
  - f) a formal warning stage with appeal rights must take place.
- 20.5 Time limits for the operation of each stage of the procedure in sickness cases should, wherever possible, be established by agreement, after taking medical and other appropriate professional advice.
- 20.6 When thinking about how to handle these cases it is helpful to consider:
  - i. whether medical advice has been sought or an occupational health referral has been made

- ii. whether, if the Disability Discrimination Act 2005 applies, steps have been taken to make reasonable adjustments to the working environment or the way the role is carried out
- iii. whether, in other cases of sickness absence, steps have been taken to make temporary adjustments to the working environment or the way the role is carried out, to ease the office holder back to full duties
- iv. the likelihood of, and prospective timescale for, a resumption of the full range of duties to the required standard
- v. whether alternative work outside the Church is available and what support might be required to enable the office holder to obtain such work
- vi. the effect of the absence on the parish or other area of ministry
- vii. how any similar situations involving the office holder have been handled in the past.

20.7 If the appointed person considers that poor performance may be the result of physical or mental illness, the issues need to be treated with sensitivity and care. The office holder must be encouraged to seek professional advice. Regulation 28 of the Ecclesiastical Offices (Terms of Service) Regulations 2009 contains a power for the bishop to direct an office-holder to undergo a medical examination where he has reasonable concerns about that person's health. If the office holder fails to comply with such a direction or authorise the disclosure of any relevant medical records when requested to do so, those operating the capability procedure may draw such inferences as appear to them to be appropriate in all the circumstances. The bishop may also wish to consider granting special leave of absence in such circumstances.

20.8 In some cases, capability issues may remain, even though all reasonable adjustments have been made and support given. If medical advice has indicated that the condition is likely to be permanent, it may be possible to deal with the situation through ill health retirement. In cases where the Church of England Pensions Board is satisfied that a disability is likely to be permanent, a disability pension and lump sum may be available to qualifying members of the pension scheme on leaving their office.

## **PART 7 - CURRENCY OF WARNINGS**

21.1 Different periods can apply to different types of warnings. The period of validity should be clear. For example, as a guideline ACAS recommends<sup>2</sup> that a first formal written warning might remain in force for up to 6 months while a final written warning may remain in force for 12 months (or more in exceptional circumstances) Warnings should cease to be 'live' following the specified period of satisfactory conduct. A decision to remove the office holder from office should not be based on an expired warning but the fact that there is an expired warning may explain why the panel does not substitute a lesser sanction.

21.2 There may be occasions where an office holder's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. If such a pattern emerges, this should be borne in mind in deciding how long any warning remains in force.

---

<sup>2</sup>*Discipline and Grievance at Work – the ACAS guide* p 33 (available at [www.acas.org.uk](http://www.acas.org.uk))



## **PART 8 – SUSPENDING AN INQUIRY**

- 22.1 If at any time during the course of a capability inquiry the appointed person decides that the concerns that have been identified should properly be dealt with by way of proceedings for misconduct under the Clergy Discipline Measure 2003 or the Ecclesiastical Jurisdiction Measure 1963, the appointed person may by written notice to all parties suspend the capability inquiry. In such circumstances the capability inquiry will be stayed until such time as the diocesan bishop notifies all parties in writing either that the inquiry will be discontinued or that it will be resumed.
- 22.2 In no circumstances should a capability inquiry and proceedings for misconduct operate at the same time in respect of the same conduct.

## Annex - Membership of panels to hear cases and appeals

Membership of the panel can be the same at each stage of the procedure but the membership of the appeal panel *must* be different from that of the original panel. If a named office-holder (e.g. a Chair or Prolocutor) is unable to act, he or she will nominate a substitute. Where necessary, for example because of illness or a member of the panel moving on to another diocese, the appointed person may ask a substitute of equal standing to serve.

The appointed person must not be a member of the Panel.

Office holder	Parochial and cathedral clergy (except Dean), including NSMs, OLMs, (stipendiary) readers and other licensed clergy	Dean or Archdeacon	Bishop	Archbishop
Informal Warning	Normally <i>appointed person</i> but Suffragan Bishop or Dean if appointed person unable to act	Diocesan Bishop	Archbishop	The senior bishop in the other province
First Formal Warning	Suffragan Bishop or Dean with 1 cleric <sup>1</sup> and 1 layperson <sup>1</sup>	Diocesan Bishop with 1 cleric <sup>1</sup> and 1 layperson <sup>1</sup>	Archbishop with 1 cleric <sup>3</sup> and 1 layperson <sup>2</sup>	The senior bishop in the other province with 1 cleric <sup>4</sup> and 1 layperson from the other province <sup>4</sup>
Appeal	Suffragan Bishop or Dean not involved with first formal warning, with Chair of Diocesan House of Clergy and Chair of Diocesan House of Laity.	Other Diocesan Bishop <sup>3</sup> With 1 cleric <sup>2</sup> and 1 layperson <sup>2</sup>	Other Archbishop with 1 cleric <sup>3</sup> And 1 layperson <sup>3</sup>	The Other Archbishop with 1 cleric <sup>4</sup> and 1 layperson from the other province <sup>4</sup>
Final Formal Warning	Diocesan Bishop with Suffragan Bishop or Dean, 1 cleric <sup>1</sup> and 1 layperson <sup>1</sup>	Diocesan Bishop with 1 cleric <sup>1</sup> and 1 layperson <sup>1</sup>	Archbishop with 1 cleric <sup>3</sup> and 1 layperson <sup>3</sup>	The senior bishop in the other province with 1 cleric <sup>4</sup> and 1 layperson from the other province <sup>4</sup>
	<b>Parochial and cathedral clergy (except Dean),</b>	<b>Dean or</b>	<b>Bishop</b>	<b>Archbishop</b>

Office holder	including NSMs, OLMs, (stipendiary) readers and other licensed clergy	Archdeacon		
Appeal	Suffragan Bishop or Dean not involved with first formal warning, with Chair of Diocesan House of Clergy and Chair of Diocesan House of Laity	Other Diocesan Bishop <sup>3</sup> with 1 cleric <sup>2</sup> and 1 layperson <sup>2</sup>	Other Archbishop with 1 cleric <sup>4</sup> and 1 layperson <sup>4</sup>	The Other Archbishop with 1 cleric <sup>4</sup> and 1 layperson from the other province <sup>4</sup>
Final capability panel	Diocesan Bishop with Suffragan Bishop or Dean and 1 cleric <sup>3</sup> and 1 layperson <sup>3</sup>	Diocesan Bishop with 1 cleric <sup>3</sup> and 1 layperson <sup>3</sup>	Archbishop with 1 cleric <sup>3</sup> , 1 layperson <sup>3</sup> , and Prolocutor of the Province	Other Archbishop with 1 cleric <sup>4</sup> and 1 layperson <sup>4</sup> from the other province and Prolocutor of the Province
Appeal	Diocesan Bishop <sup>3</sup> with 1 cleric <sup>2</sup> and 1 layperson <sup>2</sup>	Other Diocesan Bishop <sup>3</sup> with Suffragan Bishop <sup>3</sup> and 1 layperson <sup>2</sup>	Other Archbishop with Prolocutor of other Province, Vicar General of the other Province and the Chair of General Synod House of Laity	Dean of the Arches, a senior bishop nominated by the Dean, the Prolocutor of the other Province and the Chair of the General Synod House of Laity

<sup>1</sup> Nominated from another parish by the Diocesan Bishop

<sup>2</sup> Nominated from another diocese by another Diocesan Bishop

<sup>3</sup> From another diocese nominated by the Archbishop of the Province (the Vicar General where the complaint is against a priest in the Diocese of Canterbury or York)

<sup>4</sup> From another diocese appointed by the other Archbishop

**Published by the General Synod of the Church of England  
and on sale at the Church House Bookshop**

**31 Great Smith Street, London SW1P 3BN**

**Copyright © The Archbishops' Council 2009**

**£3**